

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MICHAEL PRIOR,
Appellant

v.

G1-13-48

CITY OF MEDFORD,
Respondent

Appearance for Appellant:

Michael Prior
Pro Se

Appearance for Appointing Authority:

Kimberly M. Scanlon, Esq.
City of Medford Law Department
85 George P. Hasset Drive
Medford, MA 02055

Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Michael Prior (hereinafter “Mr. Prior” or “the Appellant”), filed an appeal on December 7, 2011, regarding the decision of the City of Medford (hereinafter “City” or “Appointing Authority”) to bypass him for appointment to the position of Firefighter. A pre-hearing conference was held on March 18, 2013. A full hearing was held on July 18, 2013 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded and copies of the recording were provided to the parties. The parties submitted post-hearing briefs.

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

FINDINGS OF FACT

Six (6) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Frank Gilberti, Jr., Chief, Medford Fire Department
- Steven Lebert, Detective, Medford Police Department

For the Appellant:

- Michael Prior, Appellant;

and taking administrative notice of all matters filed in the case², as well as pertinent statutes, case law, regulations and policies; drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. The Appellant, Michael Prior, is a resident of Medford, Massachusetts. Mr. Prior took the firefighter Civil Service Examination in April 2010 and received a score of 98. He served in the United States Air Force (“USAF”) from July 2002 through September 2003. At the time of the Commission full hearing, Mr. Prior was thirty (30) years old. (Testimony of the Appellant, Stipulation of Facts)
2. On September 17, 2012, the City submitted a request to the State’s Human Resources Division (“HRD”) for a certification in order to hire eight (8) firefighters. In response to the City’s request for a Certification, HRD issued Certification #00274 on or about October 4, 2012. Subsequently, the City was allowed to hire four (4) additional firefighters for a total of twelve. Mr. Prior was

² This includes, without limitation, documents submitted by Mr. Prior on August 23, 2013 (although they were due July 25, 2013), along with Mr. Prior’s responses to the City’s recommended decision; the City’s response to Mr. Prior’s August 23 submission; and the City’s August 28, 2013 submission in response to my question to the parties seeking clarification of the two certifications for the 2010 firefighter exam.

ted in the 9th position on this Certification list but second among those who signed the Certification indicating that they were willing to accept appointment if it was offered to them. In October 2012, Mr. Prior submitted an application for employment to the Medford Fire Department (“MFD”). Ultimately, twelve (12) candidates were selected, eleven (11) of whom were ranked below Mr. Prior, one (1) of whom was tied with Mr. Prior. (Stipulation of Facts; Testimony of Chief Giliberti; Ex. 1).

3. On November 2, 2011, the City submitted a request for certification to HRD to fill seven (7) firefighter positions. HRD issued Certification # 202450 shortly thereafter. Mr. Prior’s name appeared on Certification # 202450 and he submitted an application in January 2012. However, Mr. Prior’s name was not reached and/or he was tied with one or more candidates on Certification # 202450.³ (Testimony of Chief; Post-Hearing submissions included in Administrative Notice)
4. By letter dated April 8, 2013, the City bypassed Mr. Prior. The reasons given for the bypass were: 1) health matters related to his military service; 2) Mr. Prior’s finances were not in order, with accounts overdue by more than 150 days; 3) Mr. Prior’s work history is inconsistent between his multiple applications, he has had many periods of unemployment, he failed to report his current employment, he falsely claimed to be a Medford Auxiliary Firefighter, and he improperly answered an application question regarding dismissal from a prior employer; 4) Mr. Prior asked a City Police Officer to “fix” a ticket for him while he was

³ The October 2012 certification (# 00274) resulted when the City received a grant to hire additional firefighters. (Post-Hearing submissions included in Administrative Notice)

- applying for a position with the Medford Police Department; 5) Mr. Prior acted inappropriately during a traffic stop by Det. Lebert; and 6) Mr. Prior's driving record includes seven stops, five of which were for speeding. (Ex 6)
5. Mr. Prior has been stopped for speeding five times; once in 2007, twice in 2005 (one for which he was found not responsible), and twice in 2001 (one for which he was found not responsible). He was also stopped for a seatbelt violation in 2001 and he was stopped in 2004 for a highway violation (for which he was found responsible) and for failing to use safety (for which he was not prosecuted). (Ex. 4)
 6. Information from the driving records of Mr. Prior and the twelve (12) recommended candidates were entered into evidence. Some recommended candidates had similar driving records to Mr. Prior. (Ex. 4)
 7. Mr. Prior received an honorable discharge from the USAF, although he did not complete his full term of service. (Ex. 5)
 8. Mr. Prior is not an appointed member of Medford's Auxiliary Fire Department, although he has attended meetings and accompanied the Auxiliary Fire Department on assignments. (Ex. 3)
 9. The background investigation for Mr. Prior's October 2012 MFD employment application, with respect to his finances, indicates that in 2010, Mr. Prior had one account that was thirty (30) days overdue; in 2008, he had one account that was paid in full for less than the balance, there was a paid settlement, and there was a late/collection notation; in 2007, he had one account that was closed at his request and that was 150 days overdue; and in 2006, he had one account that was

“transferred/closed”, \$1,953 was written off, and it was overdue more than 150 days (this is for the same account that was overdue in the 2008. (Ex. 3)

10. Mr. Prior has provided varying employment histories, including:

- a. in his current employment application to the MFD dated October 31, 2012, Mr. Prior indicated that he has been a volunteer Somerville Auxiliary Firefighter from March 2012 to the present (the date of his application). Mr. Prior’s previous application to the MFD, dated January 18, 2012, does not mention Somerville Auxiliary; (Exs. 2, 3)
- b. Mr. Prior’s October 2012 employment application indicates that he received unemployment for one period of time (December, 2009 through February, 2011) but his previous application and the investigation in the October 2012 application both indicate that he had also been unemployed a second time, though the previous application states that it was from December, 2004 through December, 2005 and the investigation reports that he was unemployed December, 2004 through December, 2006; (Exs. 2, 3)
- c. the application asks, “Have you ever been dismissed or asked to resign from any employment or position you have held?” If the applicant had been dismissed or asked to resign, the application indicates that the applicant should provide the employer’s name, the date, and the reason the applicant was dismissed or asked to resign. In his current application, Mr. Prior answered “no”, that he was not so dismissed or asked to resign. However, in his previous application, Mr. Prior answered the same question “yes”, indicating that the employer involved was Lifeline Ambulance where Mr. Prior had been an EMT, it occurred on October 31, 2009, and it involved a patient falling backward. Mr. Prior did not list Lifeline as an employer in his current application; (Exs. 2, 3)
- d. in his current application, Mr. Prior reports that he worked at Olsen Cadillac from June, 2004 through September, 2006 but the investigation indicates that he worked there June, 2004 through July, 2004; in his previous application, Mr. Prior wrote that he worked at Olsen Cadillac from June, 2004 through September 2004; (Exs. 2, 3)
- e. in his current application, Mr. Prior wrote that he worked for Budweiser from September, 2007 through September, 2009. His previous application stated that Mr. Prior worked for Budweiser from September, 2006 through December, 2007. The investigation found that Mr. Prior worked at Budweiser from an unknown date through August, 2007; (Exs. 2, 3) and

- f. Mr. Prior testified that he was working at Minuteman Security for approximately for one year but did not put it on either his current or his prior application; he thought it was better to note on his application that he had been volunteering in the Somerville Auxiliary Fire Department instead because it is more closely related to the work of the MFD.
(Testimony of Mr. Prior; Exs. 2, 3)

11. On January 6, 2012, Sgt. Jack Buckley at the Medford Police Department

(“MPD”) had an encounter with Mr. Prior. Specifically, Sgt. Buckley had told Mr. Prior to drop off information regarding Mr. Prior’s application to become a police officer. Mr. Prior went to the police station with the information. During their conversation, Mr. Prior asked Sgt. Buckley about a parking ticket he received. Sgt. Buckley reported that he felt as though he was being asked to ‘fix’ the ticket. Sgt. Buckley told Mr. Prior to go to City Hall about the parking ticket. (Ex. 3) Mr. Prior spoke with someone at City Hall and the ticket was dismissed.
(Testimony of Mr. Prior)

12. On or about February 8, 2013, Detective Stephen Lebert was working the 3:30pm

to 11:30pm shift. There had been a snow storm at about that time and a travel advisory to stay off the roads had been issued. Detective Lebert was in civilian clothes and was driving an unmarked car. He was driving north on Salem Street in Medford and saw a car coming toward him that was covered with snow, providing approximately only one foot of space on the front windshield through which the driver could see. Det. Lebert turned on his blue lights and drove toward the oncoming car, then swerved and stopped. Det. Lebert was wearing his gun and he was wearing his badge around his neck at that time. Det. Lebert learned later that Mr. Prior was driving the car that he (Det. Lebert) stopped.
(Testimony of Det. Lebert)

13. Det. Lebert told Mr. Prior to pull over and remove the snow from his car. Det. Lebert noticed that the car that he had stopped had a license plate relating to firefighters. A woman with the driver of the stopped car (Mr. Prior), asked Det. Lebert why he was harassing them. (Testimony of Det. Lebert)
14. Det. Lebert began to drive away when he heard what sounded like someone in the car he had stopped calling him a name. Det. Lebert made a U-turn to speak to the driver again and the parties exchanged words briefly. (Testimony of Det. Lebert)
15. When he was stopped by Det. Lebert, Mr. Prior was driving with his sister to pick up Chinese food. Mr. Prior acknowledged that there was ice around his windshield; his car windows freeze so he had to open the door to try to remove ice from the windshield, instead of lowering the window. (Testimony of Mr. Prior)
16. Mr. Prior's license plate is a memorial firefighter license plate; his grandfather had been a firefighter. (Testimony of Mr. Prior)
17. Det. Lebert did not ticket Mr. Prior as a courtesy because he thought that Mr. Prior could be a firefighter but also because detectives do not pull cars over unless it's for a crime being committed or it involves driving to endanger. (Testimony of Det. Lebert)
18. Thereafter, when Det. Lebert returned to the police station, Sgt. Duffy told him that someone contacted the police station wanting to talk to Det. Lebert about the stop Det. Lebert had made earlier that day. (Testimony of Det. Lebert) It was Mr. Prior who had contacted the police station in this regard. (Testimony of Mr. Prior)

19. The City subsequently bypassed Mr. Prior and he filed the instant appeal. (Ex. 6; Appeal)

DISCUSSION

Applicable Civil Service Statutes and Rules

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. at 304. “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct.331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

Appointing Authority’s Argument

The City argues that the bypass was justified because of Mr. Prior’s poor past employment, his poor finances, his driving record and his inaccurate statements regarding his employment. The City emphasized Mr. Prior’s alleged attempt to get a parking ticket “fixed” and his run-in with Officer Lebert. Finally, the City argues that medical matters related to his military service provide grounds for bypass.

Appellant’s Argument

Mr. Prior asserts that he is a veteran and that his periods of unemployment, as well as his financial problems, were due to the seasonal nature of his work. Mr. Prior

disputes the City's version of the incidents related to the parking ticket and avers that at the car stop, it was Det. Lebert who behaved inappropriately, not him.

Analysis

The City has shown, by a preponderance of the credible evidence, that there was reasonable justification to bypass Mr. Prior for some, but not for all of the rationale provided.⁴

The City offered as evidence, without objection, Mr. Prior's current application for employment with the MFD, along with an application for the MFD that he had submitted during a previous round of hiring. There are significant inconsistencies between Mr. Prior's self-reported employment history between the application involved here and the prior application submitted to the MFD. In addition, neither application lists his current employment as a security officer—an omission for which he has no explanation, other than that he thought listing his work with the Somerville Fire Auxiliary “looked better.” Further, in the Appellant's previous application he stated “yes” in response to the question asking whether he had resigned or been dismissed from a job but stated “no” in his current application that he had not so resigned or been dismissed from a job.

Such inaccuracies are not easily overlooked. It is reasonable for the City to be concerned that Mr. Prior could be fabricating the dates of employment, or is simply unconcerned with these important details. This seriously undermines Mr. Prior's candidacy and raises a concern that some of these dates may have been manipulated in order to cover periods of unemployment. As truthfulness is required of all public safety

⁴ The Commission does not consider any potential medical issues that may have been considered absent a conditional offer of employment.

employees, these concerns are especially relevant. Therefore, Mr. Prior's employment history and the inaccuracies of his application provide reasonable justification for bypass.

The City argues that Mr. Prior was untruthful in his representation that he was a member of the Medford Auxiliary Fire Department. The background investigation, entered into evidence as Exhibit 3, shows that two members of the Auxiliary were contacted. Both Auxiliary members confirmed that Mr. Prior attended meetings and both stated that he was not an appointed member. One stated that Mr. Prior had accompanied the Auxiliary to fires. Since Mr. Prior had some involvement with the Medford Auxiliary, his representation is not entirely untruthful. However, he listed his position in the Auxiliary as "Private," a rank which, to this Commissioner's knowledge, is not used in the Medford Auxiliary or any Fire Department. Moreover, at the full hearing here, Mr. Prior was given an opportunity to provide further proof regarding his involvement in the Medford Auxiliary Fire Department but he did not provide any additional information in this regard. Under the circumstances, this inaccuracy was a proper reason for bypassing the Appellant.

Mr. Prior has been stopped for speeding five times: once in 2007; twice in 2005, one for which he was found not responsible), and twice in 2001(one for which he was found not responsible). He was also stopped for a seatbelt violation in 2001 and was also stopped for a moving violation in 2004. Exhibit 4 shows some candidates who were given conditional offers of employment had similar driving records.⁵ As such, this was not a valid basis for bypass. That said, this establishes a bad precedent for the City and it may endanger public safety.

⁵ Indeed, some had more recent and serious entries, including accidents.

The City alleges, based on the report of a police officer who did not testify, that Mr. Prior, while delivering papers related to an employment application for the City Police Department, asked to have a parking ticket “fixed.” It is undisputed that Mr. Prior did bring a parking ticket to the Police Department and ask what he should do about it. Mr. Prior claims that the ticket was erroneously issued and that he asked the police only because he was confused about the way to dispute such a ticket. The City claims that Mr. Prior’s inquiry about the ticket was actually an innuendo that he wished for the officer cancel the ticket as a personal favor. It was at least ill-advised, if not inappropriate, for Mr. Prior to ask a police officer about a parking ticket while delivering employment application information related to his then-application to become a police officer. It is clear that Mr. Prior disputed the ticket and sought redress in that regard. Indeed, Mr. Prior indicated that he was aware that it was the Police Department that had issued the parking ticket. In fact, as the police officer he spoke to in this regard suggested, Mr. Prior went to City Hall, where he spoke with someone to complain about the ticket and the ticket was dismissed. As such, the Appellant’s conduct in this regard provided further reasonable justification to bypass Mr. Prior.

The City also bypassed Mr. Prior based on his financial history. Specifically, the City’s background investigation in 2012 found one relatively minor financial difficulty in 2010 but more significant financial difficulties during the period 2006 – 2008. While these problems may not provide reason for bypass on their own, when combined with the other justified reasons for bypassing the Appellant, they support the City’s decision.

The Appellant’s conduct during the traffic stop of his car by Det. Lebert during a snow storm also provides reasonable justification for bypassing him. Although Det.

Lebert was in an unmarked vehicle and dressed in civilian clothes, it is not credible to assert that the Appellant was unaware that Det. Lebert was a police officer stopping him for official reasons. Det. Lebert operated his vehicle's lights to notify the Appellant to stop. When Det. Lebert approached the Appellant's car, he was wearing his gun and his badge on a chain around his neck. In addition, it is clear from Mr. Prior's testimony that he understood and acknowledged the reason he was stopped and what the Detective had ordered him to do. The fact that Mr. Prior apparently exhibited conduct indicating that he was not happy with the stop and reported it to the Police Department supports the City's decision to bypass him. Det. Lebert asserted that he asked Mr. Prior directly whether he was a firefighter and that Mr. Prior answered in the affirmative or did nothing to indicate to the contrary and that Det. Lebert did not ticket Mr. Prior for that and another reason.

Mr. Prior alleged briefly that there was bias in the hiring cycle, asserting that the father of two (sibling) applicants is a member of the MFD, that another candidate is related to a retired MPD officer, and that other candidates are related to other City officials or representatives. However, the allegations were unsupported and, therefore, not established.

CONCLUSION

Based on the foregoing facts and applicable law, a preponderance of the evidence establishes that the City had reasonable justification to bypass the Appellant. Therefore, the Appellant's appeal under Docket No. G1-13-48 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners) on September 19, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Michael Prior (Appellant)
Kimberly M. Scanlon, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)